

Representing the Department of Defense in Environmental Matters

Assistant Attorney General John Cruden Shares His Perspectives With *Currents* Readers



IN JANUARY 2015, I returned to the U.S. Department of Justice as the Assistant Attorney General for the Environment and Natural Resources Division (ENRD) after spending 2011 to the end of 2014 as President of the Environmental Law

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- Enforce the nation's bedrock environmental laws to protect air, land, and water for all Americans.

sented the Defense Department have matured and expanded over the years, much as the field of environmental law has itself developed and changed over time.

Since its creation over a century ago, the Environment and Natural Resources Division has represented the interests of the Department of Defense in a variety of affirmative and defensive matters.

Institute. I am, however, well aware of the broad array of important legal issues that arise in the course of the Department of Defense's (DoD) work. I graduated from West Point and served in multiple legal positions at the DoD before joining the Department of Justice, and served as the chief of the Environmental Enforcement Section and then the Deputy Assistant Attorney General over two decades.

As the Assistant Attorney General, two of my five goals for ENRD are to:

These priorities are closely linked with ENRD's representation of the DoD, past and present. To fully understand the interconnection between these two goals in relation to ENRD's representation of the DoD, one must understand the history of ENRD at the Justice Department and its organizational structure.

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ENRD was first called the Public Lands Division at its inception on November 16, 1909. It was originally created to handle all suits and proceedings concerning the enforcement of public land law on behalf of the United States, including litigation related to Indian rights. As the nation's laws developed, the responsibilities of the Public Lands Division expanded. It was renamed as the Lands Division in 1933, and then again as the Lands and Natural Resources Division in 1965 to more accurately reflect its work that

included protecting public interests in natural resources in addition to administering public land law. The mission and workload changed most significantly with the passage of a suite of environmental and natural resource laws in the 1970s and 1980s. These included the National Environmental Policy Act, Clean Air Act, Clean Water Act, and Endangered Species Act among others along with the creation of the U.S. Environmental Protection Agency (EPA) and other agencies. The Division was renamed in 1990 as ENRD to reflect the growing environmental case workload. The responsibilities of ENRD have continued to evolve, including the recent addition of the animal welfare and worker safety laws to its responsibilities.

Structure of the Environment and Natural Resources Division

ENRD is composed of the Assistant Attorney General, a presidentially appointed and Senate confirmed position, as well as four deputy assistant attorneys general and ten sections. With the exception of the section that is the Executive Office, the nine litigating sections are structured based upon areas of substantive law. The litigating sections include:

1. Environmental Defense
2. Natural Resources
3. Land Acquisition
4. Appellate
5. Wildlife and Marine Resources
6. Environmental Enforcement
7. Law and Policy
8. Environmental Crimes
9. Indian Resources



John C. Cruden

ENRD employs over 600 staff, including more than 400 attorneys, who are primarily located in Washington, DC. Approximately 70 staff are located in field offices in Sacramento and San Francisco, California, and Denver, Colorado, with Denver being the largest field office.

In any given year, ENRD's caseload is roughly equally divided between affirmative and defensive litigation. The top five agencies ENRD primarily represents, in order of case volume, are the EPA, Department of Interior, DoD, Department of Agriculture, and Department of Commerce (National Oceanic and Atmospheric Administration). In any given year, the Defense Department consistently ranks third in volume of cases among the federal agencies ENRD represents.

The ENRD section with which the Defense Department has the most interaction is the Environmental Defense Section (EDS). As the name implies, EDS represents the United States in all defensive litigation for

alleged violations of the various pollution control laws. Despite its name, EDS's responsibilities also include some affirmative litigation. EDS represents the United States in all affirmative civil judicial litigation enforcing Section 404 of the Clean Water Act (a/k/a wetlands or waters of the United States matters) and certain aspects of Sections 10 and 13 of the Rivers and Harbors Act. The primary agencies EDS represents in bringing these cases are the U.S. Army Corps of Engineers and the EPA.

The Natural Resources Section (NRS) represents the United States in defensive litigation arising under more than 80 statutes, treaties, and the U.S. Constitution related to federal lands, resources and ecosystem management issues. NRS also represents the United States in Fifth Amendment takings matters involving federal activities affecting private property. An example of the type of Fifth Amendment takings

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cases in which NRS has represented the Department of Navy involve over-flight cases, such as the litigation in *Testwuide et al. v. United States* (Fed. Cl.). Through the successful and cooperative working relationship between NRS and the Department of Navy, ENRD has been able to negotiate several settlements in these cases.

The acquisition of land for public lands and government operations, including protecting the homeland, has been a continuous part of ENRD's work since its creation. The Land Acquisition Section (LAS) is one of our oldest practice areas and is responsible for eminent domain and condemnation matters for the United States. LAS's work includes affirmative condemnation cases, appraisal reviews and title matters. LAS is currently working with the Navy in San Diego in a case which will be discussed later.

The Appellate Section handles the civil and criminal appeals work of ENRD. The Appellate Section handles appeals from district court cases under ENRD's purview, encompassing more than 200 statutes and petitions for review for the Department of Energy, Federal Energy Regulatory Commission, and Federal Aviation Administration. In a typical year, the Appellate Section handles approximately 250 cases, including several Supreme Court merits cases. More than half of the cases are typically in the Ninth and Tenth Circuits due to the vast amount of federal land in the western United States.

The Wildlife and Marine Resources Section (WMRS) is responsible for civil enforcement of the federal wildlife and marine species conservation laws and the animal welfare laws as well as defense against suits brought under the same laws. These laws include the Endangered Species Act, Migratory Bird Treaty Act, Marine Mammal Protection Act, and Animal Welfare Act among others. WMRS and NRS were responsible for defending the Navy sonar activities in a series of high profiles cases.

The Environmental Enforcement Section (EES) litigates all affirmative cases under the federal environmental pollution laws, except those enforced by EDS discussed earlier. The Defense Department interacts with EES when EDS is representing the Defense Department for alleged violations of the pollution control laws. This most often occurs in matters involving the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) matters.

The remaining ENRD sections that work less frequently with the Defense Department include the Law and Policy Section, Executive Office, Environmental Crimes Section, and the Indian Resources Section. The Law and Policy Section handles a broad variety of environmental legal and policy matters, including reviewing pending regulations and legislation, ENRD's international work, and the amicus practice in federal district

courts and state courts. The Executive Office provides ENRD administrative support in addition to litigation support for the nine litigating sections and client agencies (e.g., discovery). The Environmental Crimes Section prosecutes individuals and corporations who criminally violate the laws under ENRD's purview and associated general crimes under Title 18 of the United States Code (e.g., false statements and conspiracy). The Indian Resources Section represents the United States in litigation to protect tribal lands, resources, and jurisdiction and treaty rights. This includes defense of federal statutes, regulations, programs, and actions benefiting Indian tribes and their members.

Appellate Practice

As Deputy Solicitor General Michael Dreeben explains, "While the United States has a special obligation to serve the broader interests of justice in every court, appellate lawyering offers an especially pure form of this duty. In appellate courts, the government is constantly balancing its interest in prevailing in an individual case with its broader interest in establishing sound rules of law that serve the national interest." (United States Attorneys' Bulletin, January 2013, vol. 61, no. 1, p. 5.)

ENRD, like each litigating division of the Justice Department, has an appellate section which in turn handles that division's cases in federal courts of appeal, state courts of appeal, and in

state Supreme Courts. Much of the ENRD appellate work in state appellate courts relates to the allocation of water resources, which is generally a state responsibility. While the trial sections may sometimes be required to defend less than ideal agency records in district courts, the appellate process gives the United States the authority to decline to pursue an adverse decision in the court of appeals where the record presents considerable litigation risks or where broader institutional interests counsel against an appeal.

When the United States loses a case or receives an adverse decision in a lower court, an appeal may only be authorized by the Solicitor General. Under federal regulations and Justice Department policy, the Solicitor General is responsible for deciding whether any appeal is filed by the government in the appellate courts including petitions for rehearing en banc (i.e., before the full court of

Section obtains recommendations from the client agency and the trial section, including where applicable the local U.S. Attorney's Office. Other agencies with an interest in the litigation may also provide recommendations to the Appellate Section. The Appellate Section submits a preliminary recommendation to the Assistant Attorney General, and then submits the final recommendation including the trial and agency recommendations to the Solicitor General who makes the final decision.

ENRD works very closely with the Office of the Solicitor General on decisions about appeals and on briefs in ENRD cases being filed before the U.S. Supreme Court. ENRD typically coordinates client agency reviews of the Office of the Solicitor General drafts. The client agency and ENRD may participate in the moot courts in advance of oral arguments before the U.S. Supreme Court.

Given that the Justice Department, an executive agency, represents all other executive agencies in legal matters, this often raises the question of whether there is a legal conflict of interest in these multiple representations. In the private sector, it is a general and fundamental rule of professional conduct that an attorney or law firm cannot represent opposing parties in the same cause of action. However, when two agencies' interests in a case differ, the Justice Department does not have a conflict of interest. The Justice Department and the relevant agencies all represent the United States. Any conflict among different agencies are to be resolved internally within the Justice Department, by the Attorney General if necessary, so that the government presents a unified position in court on behalf of the executive branch. The U.S. Supreme Court in *Nevada v. United States*, 463 U.S. 110 (1983) and several other federal appellate

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appeals judges), amicus filings in appellate courts, petitions for certiorari (i.e., request for a higher court to review a lower court decision), and petitions for extraordinary writs. See 28 C.F.R. § 0.20(b)(c) and Department of Justice, United States Attorneys' Manual §9-2.100. These decisions are made in consultation with the agency.

In deciding whether to recommend appeal of an adverse decision to the Solicitor General, ENRD's Appellate

Client Agency Concept

The Justice Department represents the United States (i.e., the Executive Branch) in court. The fundamental proposition that the United States is the client and not just the agency is sometimes referred to as the unitary executive principle. That concept has its foundations in Article II of the U.S. Constitution. Under Section 1 of Article II, the power of the Executive Branch of government is vested in the President of the United States.

and district court opinions have all generally held that where the Justice Department is charged by law to represent multiple interests, there is no conflict of interest of the type that would arise if private counsel attempted multiple representations of different entities.

ENRD is often called upon to resolve disputes between agencies regarding litigation positions. To determine the position of the United States on a

particular issue in trial practice, and especially in appellate litigation, all interested components within the government have the opportunity to be heard through written memoranda and often through meetings with ENRD leadership.

Although the process of arriving at a single United States legal position can sometimes take some time, the result is that the government has a consistent understanding of the application of the law, whatever the interests of the government may be in a particular matter. That approach is highly beneficial to the rule of law.

Case Examples

Most, if not all, of the matters in which ENRD represents the Department of Navy involve the goals I have established for the Division:

1. Protecting the public fisc and defending the interests of the United States
2. Enforcing the nation's bedrock environmental laws to protect air, land, and water for all Americans.

The cases described below are examples of successful cases on behalf of the Department of Navy that also demonstrate how ENRD is meeting these goals.

U.S. v. 32.42 Acres of Land, 683 F.3d 1030 (9th Cir. 2012), is a successful condemnation case that protected the public fisc and defended our nation's national security interests by obtaining land for the Anti-Submarine Warfare Training Center in San Diego, California. In 2005, a condemnation suit was filed to acquire the outstanding interests in filled tidelands that were under a 50-year lease agreement to the United States for the Navy's training center. Suit was filed against the San Diego Unified Port District which owned the underlying fee estate that was subject to a public trust interest of the State of California. The San Diego Port District initially claimed its interest, right to return of the property on August 8, 2049, was worth in excess of \$50 million dollars. A number of pre-trial rulings permitted the taking and recognized the legal parameters as to the property's development potential which resulted in a decrease of the San Diego Port District's valuation. After a trial, a federal jury set the just compensation at \$2.91 million dollars. The San Diego Port District appealed, and the Ninth Circuit affirmed the district court by holding that the United States could extinguish the state's public trust rights when federal eminent domain is exercised.

ENRD has been working with the Navy to acquire lands necessary for the Broadway Complex redevelopment project that was authorized by Congress in 1986. Currently, ENRD is representing the Navy in *United States v. 1.647 Acres (0.826 +/- Acres - E Street Corridor and 0.821 +/- F Street Corridor) of Land, More or Less, Located in San Diego County, State of California, et al.*, (S.D. Cal.), to condemn a fee simple interest in segments of two streets in San Diego for the redevelopment project. This taking has been challenged by the San Diego Port District and the State. These streets have been the subject of two prior condemnation cases in the 1990s by the United States involving the San Diego Port District and the State. The pending challenges to the United States' right to take the property include there is no statutory authority for the taking based upon the property value; the property is being taken for private commercial development instead of a public purpose; and waiver and preclusion issues apply from prior condemnation litigation.

In re *Water Use Permit Application*, 9 P.3d 409 (HI 2000), is an example of a successful water allocation case litigated in a state Supreme Court. In this multi-party litigation, ENRD represented the Department of Navy's interests to ensure that water allocations were available to recharge the Pearl Harbor aquifer.

In *Natural Resources Defense Council v. Blank* (N.D. Cal.), we successfully defended the Department of Navy's use of the antisubmarine surveillance system known as Surveillance



The Military Sealift Command ocean surveillance ship USNS Impeccable (T-AGOS-23) is one of five ocean surveillance ships that are part of the 25 ships in the Military Sealift Command Special Mission Ships Program. Impeccable directly supports the Navy by using both passive and active low frequency sonar arrays to detect and track undersea threats.

Towed Array Sensor System Low Frequency Active sonar (SURTASS LFA). The plaintiffs alleged that the National Marine Fisheries Service and the Department of Navy violated the National Environmental Policy Act, Endangered Species Act, and Marine Mammal Protection Act by authorizing the deployment of SURTASS LFA, especially during concentrated training exercises, would harm thousands of marine mammals, including endangered and threatened species. At the conclusion of this litigation, ENRD was able to prevent the entry of any injunction and successful in disposing the majority of the case. The one minor area where we were unsuccessful was easily remedied without interruption to the Navy's training exercises.

Winter v. Natural Resources Defense Council, 555 U.S. 7 (2008), is the case successfully litigated before the U.S. Supreme Court that preserved the Department of Navy's ability to use mid-frequency active sonar during drills given the possibility of harm to marine mammals. The issue before the Court was whether the Navy's decision to conduct training exercises off the coast of southern California complied with the National Environmental Policy Act, the Coastal Zone Management Act, and the Endangered Species Act. A series of judicial decisions were issued by the district court and Ninth Circuit that culminated in a district court issuing a preliminary injunction to the Department of Navy that imposed restrictions on the use of sonar in Navy exercises off the coast of southern California.

The Council on Environmental Quality authorized the Navy to implement an alternative arrangement to National Environmental Policy Act compliance

and allowed it to continue its exercises under voluntary mitigation procedures that were previously adopted. The Supreme Court vacated the preliminary injunction, holding that the lower courts had misapplied the preliminary injunction standard and abused their discretion by imposing restrictions on the training exercises. The Court found that by entering a preliminary injunction based on plaintiffs' showing of the mere "possibility" of irreparable harm, the lower courts set the bar too low for such an extraordinary remedy. The Court further held that the balance of the equities and the public interest strongly favored allowing the Navy exercises to proceed without the restrictions imposed by the lower courts, as the interests of the Navy in conducting realistic training exercises outweighed the plaintiffs' interests.

Subsequently, the case was resolved by an out of court settlement. As part of the settlement, the Navy affirmed its previously stated commitment to completing National Environmental Policy Act compliance documents and Endangered Species Act and Marine Mammal Protection Act compliance documents if applicable for various training ranges consistent with its comprehensive strategy to assess the effects of mid-frequency sonar on the marine environment.

Conclusion

Protecting governmental interests, such as national defense and the national

For More Information

MORE INFORMATION ABOUT ENRD, including case resolutions, can be found at www.justice.gov/enrd.



treasury, while simultaneously protecting the environment and natural resources are clear goals for the Justice and Defense Departments who have a long rich history of addressing these issues. ENRD has a long history of working with all components of the Navy and consider it a great honor to represent the Navy in court—working to protect national security concerns and fulfill the missions of the Navy while simultaneously advancing the environment. Our experience has been that Navy officials and their attorneys are superb professionals, extremely committed, very knowledgeable, and absolutely fun to work with. ⚓

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